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In The

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1442

DONALD M. PETERSON,

Petitioner,

v.

CASPAR W. WEINBERGER, Secretary of Health, Education and Welfare, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING
Under Rule 58(2)

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Petitioner presents his Petition for a Rehearing of this Court's Order dated October 6, 1975, denying the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, and, in support thereof, respectfully shows:

GROUNDS FOR REHEARING

Petitioner now petitions for a remand, a method of disposition of this case inconsistent with his original petition requesting a hearing by the Court on Constitutional and other legal issues. Further, this Petition for Rehearing is based on post-trial and recent events not reflected in the record. As the Petition for Writ of Certiorari has been denied, this case must now be remanded to the lower courts. The petition now requests a remand with special instructions, for both the Court of Appeals and the U.S. District Court.

It is proper for the Court to consider Petitioner's alternative not previously presented, *Schriber-Schroth Co. v. Cleveland Trust Co.*, 305 U.S. 47, 50; 83 L.Ed. 34, 36. The Court may order a case remanded to lower courts for adjudication of subsequent developments. *White v. Regester* (June 30, 1975) ..... U.S. ....., 45 L.Ed.2d 662 and *Hill v. Printing Industries of the Gulf Coast* (June 30, 1975), ... U.S. .....; 45 L.Ed.2d 664.

The only Petitioner before the Court is Dr. Donald M. Peterson. The third party defendant, James E. Peterson and brother of Petitioner, did not contest the $131,607 liability against him under the False Claims Act. But Petitioner contends the courts erred in holding him also jointly and severally therefor, and that liability under the False Claims Act should be limited to the principal, James Peterson.

The lower court opinions in this case, and in a companion criminal case based on conspiracy/false statement charges, were reported as follows:

Date of CA 5 decision	*Style of case*	*Appellate court decision*
January, 1974	U.S. v. Peterson, 488 F2d 645.[1]	Charges were based on false statements/ conspiracy and CA5 concluded Dr. Peterson himself knew not about the filing of the claims, and thus was not guilty.
February, 1975	Peterson v. Weinberger, 508 F2d 45,[2] 370 F. Supp. 1259[3]	Charges were based on False Claims Act (FCA), and CA 5 based on the same facts adopted a contrary conclusion, namely that Dr. Peterson himself was also responsible for filing false claims, and this violated the FCA.

QUESTIONS PRESENTED

The two questions presented in this motion for rehearing are as follows:

1. Upon remand, should the Court of Appeals for the Fifth Circuit be ordered to follow in this case the holdings of its previous decision (which are inconsistent with the instant case holdings) or else, sitting in Banc, be directed to distinguish or reverse its previous decision?

2. Upon remand, should the Federal District Court be or-

[1] A copy of this opinion appears in the original petition as Exhibit C.

[2] A copy of this opinion appears in the original petition as Exhibit B.

[3] A copy of this opinion appears in the original petition as Exhibit A.

dered to direct a verdict favorable to Petitioner or grant him a new trial, as Petitioner was denied a fair trial, due *inter alia* to government's denial of discovery of the government case file?

MATERIAL FACTS

1. Inconsistent Decisions

Shortly after Dr. Peterson began this suit in September, 1971, for an injunction to stop abuse of his medical practice by HEW, for tort damages, and for collection of fees due him, Justice Department attorneys warned him to expect more harrassment if he refused to withdraw his suit. Justice advised an all-out effort would be made, to attribute to Dr. Peterson the $17,000 in wrongful claims filed by the physician's brother. Justice admitted the claims had not been filed by Dr. Peterson, but they adopted a game theory or litigation strategy: having no valid defense, their best position was an aggressive, overwhelming offense. Such an offense was launched, and pursued, despite their off-the-record admission that Dr. Peterson was not involved in filing the claims.

Three criminal indictments were brought against Dr. Peterson, charges based on several different statutes, 18 U.S.C., Sec. 286, 18 U.S.C. 287, 18 U.S.C. 371, and 18 U.S.C. 1001. Meanwhile, trial of the Petitioner's case was delayed. Then, in addition, charges were made in the instant case under 31 U.S.C., Sec. 231 (the False Claims Act), and James E. Peterson was joined as a party thereto. The final result of the three indictments is set forth in the Fifth Circuit Court of Appeals opinion, *U.S. v. Peterson, supra.* Therein, after re-

viewing the facts the court concluded the filing of claims was done only by James E. Peterson, the filing was not a joint act involving Dr. Peterson, and obviously Dr. Peterson was not a conspirator to the wrongful act of filing. Obviously, said the court, because of the fact that the change in address made in the applications by James Peterson was meaningful, and proved non-participation by Dr. Peterson.

The CA 5 conclusion in the instant case (*Peterson v. Weinberger, supra*) is irreconcilably inconsistent with its earlier decision though the case facts, the same claims are involved. A reading of the incomplete findings of fact in the appellate court decision in the instant case leaves one confused, for the evidentiary facts are inadequate to support its conclusion that Dr. Peterson filed false claims. The wrongful act was the filing of false claims, yet the only act of Dr. Peterson (paying money) was independent thereof and occurred weeks after the alleged wrongful act. Guilt was concluded here based solely on association, because James Peterson is the brother of Petitioner, Dr. Peterson.

The first opinion of the court of appeals was decided by one panel of judges, and a reading of it shows an astute evaluation of circumstantial facts. The second opinion, decided by a different panel, shows an ignoring of the facts and reasoning contained in the earlier decision.

At the oral hearing, before the Court of Appeals, in response to inquiries from the judges, Petitioner's counsel stated that Petitioner relied on the sound conclusions and intelligent reasoning in *U.S. v. Peterson, supra,* decided ten months ear-

lier, which involved the same facts, and these had been adjudicated. The opinion of the second panel made no mention of estoppel, made no effort to reconcile the two cases; instead, the panel adopted inconsistent results.

The six significant dates and events in the court proceedings involving these two companion cases are as follows:

1. February, 1973	First trial of false statement charge and conspiracy to defraud charge
2. June, 1973	Trial of instant case: False Claims Act[4]
3. August, 1973	Writ of mandamus sought against trial judge (instant case)
4. October, 1973	Decision in instant case by trial judge
5. January, 1974	Reversal of first case by CA 5
6. February, 1975	CA 5 decision in instant case

The facts have been stated briefly and concisely. The complete facts present a case much more favorable to Petitioner. The relentless attack of Justice has not been limited to Petitioner. A malpractice suit, politically inspired, was initiated by the Washington office of Justice against former co-counsel of Petitioner (D.K.), who withdrew from the case to serve as First Assistant Attorney to the Texas Attorney General. This was an unmeritorious suit, so much so that the Dallas attorney of Justice (KM) refused to file the suit sent to him by Washington. So the suit was filed in Austin, Texas, where the attorney now resides. D.K. first learned of the malpractice

[4] Unable to get a severance of third party defendant (James Peterson) from this case (the defendant held guilty) petitioner was forced to waive a trial by jury. With James Peterson being tried jointly before a jury, an adverse verdict against petitioner was a certainty. Consequently, the findings of fact and verdict here were those of the trial judge.

suit against him by reading the newspaper accounts. Last week in response to a motion for summary judgment, this suit was dismissed. Incidentally, Justice also used public relations and Dallas newspapers in attacking Petitioner, to abuse him and discourage him from continuing this litigation.

There is a second inconsistency in this case, involving the rule of law applied. Contrary to the rule of law adopted by the circuit in *U.S. v. Prioli* (CA 5, 1959) 272 F.2d 589, the appellate court has held Petitioner liable under the F.C.A., based on an imputed intent. Under the rule of *stare decisis*, unless and until this Court should reverse *Prioli*, the appellate court was bound to follow the established law, as announced in that case. Its failure to do so denied due process of law to Petitioner.

2. Facts — Bad faith, denial of fair trial

The situation confronting the government in October, 1971 was briefly this: a suit had been filed by Petitioner, a physician who had been abused, had been deprived of due process. Although Petitioner was only one of many physicians so deprived, clearly this particular case was a most unfortunate one for the government. There was gross abuse; it would be a difficult case to defend. An adverse decision could be a costly precedent. The government considered it (in words used by the prosecuting attorney in describing it to the jury) "a most important case."

Not having any valid defense, the government adopted legal tactics based on a vigorous attack. In view of Petitioner's limited resources, obviously it would be easy to overwhelm

him. The government had adequate means, and they found an instrument, though it was unfair and unethical. For two years the government had been sitting on a completed investigation of a Medicare operation of Petitioner's brother. Included in the investigation was some $17,000 in Medicare claims, for which incidentally services had been rendered to patients. The wrongful act was the filing of these claims, and always the government has known, and off-the-record has freely admitted, the non-involvement of Dr. Peterson in filing these claims. The wrongful act involved only the brother and his business; the filing was done completely independently of Petitioner.

Nevertheless, government legal tactics have succeeded: the smear attack did, though unfairly and falsely, attribute the claims to Petitioner, despite the facts. A decision by the trial and appellate courts on the really important issue presented herein has been avoided: Where a physician has been denied due process and abused through a conspiracy, what is the personal liability of filed investigators acting without authority, and the liability of government and the cooperating insurance companies.

With respect to its deficient suspension procedures denying due process to physicians, HEW has changed its practices, now giving written notice and a hearing before a physician is suspended. Also, in the 1972 Amendments to Medicare, Congress set up by statute procedures to protect and implement the Constitutional right, to prevent future abuses and denial of due process such as that which occurred here.

The facts reflecting bad faith of the Federal Government

in this case are not contained in the record. Some such facts have become apparent only recently, after the trial of this case. Principally involved in these facts are three government employees: (1) Dallas attorney for Justice (KM); (2) the trial judge's court reporter (CL); and (3) the HEW field investigator (CG). Incidentally involved is the trial judge and a Justice Department attorney (a high official whose identity is unknown to Petitioner's trial counsel but is known to the trial judge and to Justice).

As to the Dallas Attorney for Justice:

Shortly after Petitioner's counsel filed this case to stop HEW abuse and harrassment of Dr. Peterson, in September, 1971, Petitioner's counsel visited the Dallas office of Justice Department, seeking relief without further litigation. Counsel waited to talk with the Assistant U.S. Attorney (KM) in his secretary's adjoining office, and the door between offices was open. KM was busy talking about this case on long-distance to his superior, to a justice department lawyer in Washington. The conversation was lengthy, continuing more than 30 minutes. The views of the Dallas attorney were made quite clear; he insisted:

(1) any offensive launched by Justice against Dr. Peterson was wrong and a mistake;

(2) clearly, Dr. Peterson had done no wrong, he was not guilty, but instead was an innocent party. Bringing charges against Dr. Peterson was proceeding against the wrong party, as Dr. Peterson was not a party to the filing of claims (the alleged fraudulent scheme);

(3) the abuse of Dr. Peterson, and his character and reputation had been investigated, as well as the facts about the Medicare claims and payments, and based thereon a settlement of the litigation was strongly recommended;

(4) reluctantly, KM agreed to represent Justice in the civil proceedings, but in so doing insisted the planned course of action of Justice was in error, since action was being taken against the wrong person, an innocent party. He pled for Justice to take a different course.

This Justice attorney (KM), a year or so later, in the presence of Petitioner's counsel and another attorney, admitted the evidence produced by Petitioner before trial was sufficient to convince him that Dr. Peterson did not participate in the wrongful act (filing false claims), that he felt sorry for the innocent victim, but that the defense of Dr. Peterson was simply not his responsibility.

On another occasion the Justice attorney (KM) stated that Justice Department, despite the convincing facts to the contrary, intended to succeed in its efforts "to pin these claims onto Dr. Peterson." And he also admitted "the claims should not be attributed to Dr. Peterson."

Further, KM often communicated his desire to settle, and he approved certain settlement offers submitted, and forwarded them to Washington, recommending acceptance. But the offers were rejected by the high official of Justice in Washington. This Dallas attorney of Justice knew not of the existing inside track of communication and influence possessed by the high official, with the trial judge, nor did Petitioner's counsel at that time know of this illicit relationship.

As to the trial judge's court reporter:

Subsequent to the June, 1973, trial in this case, accompanied by a third person, counsel for Petitioner met to discuss the record in this case with the trial judge's court reporter (C.L.). Previous to the conference the reporter had been drinking alcohol, and consequently he was talking freely.

Petitioner's counsel commented that all rulings of the trial judge were consistently adverse to Petitioner, and many were clearly unfair and erroneous. Conjecture was made as to the motivation for such rulings, for example, rulings denying inspection and discovery and depriving Petitioner of right to call witness designated in pre-trial order.

First, the reporter explained the rulings were not motivated by the persuasion, friendship or personality of the Dallas government attorney (KM). He referred to KM as no more than "a little pipsqueak."

The reporter continued: instead, the trial judge talked frequently with "a top attorney in Justice in Washington," a "friend of long standing with the judge." In order "to get advice," he said, the trial judge talked to Washington on several occasions.

The trial judge had been appointed to his Federal judgeship less than two years previously. It is understood in Dallas that his appointment was greatly facilitated, if it was not the result of, participation of the Justice Department attorneys.

However, Petitioner's counsel believes the trial judge is a man of high principle, a man who cannot be bought. But the judge is also a generous man, who would be inclined to

pay a moral obligation, and gratitude could influence his action. But clearly bribery could not buy him. Here, though, we have a gratitude situation, to which this conscientious judge could be susceptible. It is believed the rulings, verdict and decisions, as made by this young, ambitious Federal judge, in this case were improperly influenced by the "top official of Justice in Washington."

As to HEW field investigator:

Petitioner's attorneys have never been permitted to inspect the government's case file, either for Dr. Peterson or for the Medicare claim investigation. Timely pretrial demands, oral and written, were properly made, as prescribed by Federal rules for discovery.

The first bad-faith response of the government was in December, 1971, when Justice purportedly offered all government files on Dr. Peterson, in response to demands made by Petitioner's attorneys. Justice has since admitted such files were incomplete.

During the trial the judge conducted a hearing on failure of pre-trial discovery.

The HEW field investigator (CG) who had custody of the case file testified. He admitted the case file as submitted for inspection immediately prior to trial was not the complete case file, as many significant documents were missing. The government did not justify its failures except the witness said many many government attorneys had used the files for the prosecution of Dr. Peterson in the four cases brought against him. Of course the trial of the instant case, the first one filed, had been

successfully delayed by the government. This, he said, may be the cause of the incompleteness of the file. In fact, the file submitted for inspection consisted only of insignificant documents, as indicated in the record.

As CG is a defendant herein and personal liability is asserted against him along with other HEW employees who had unlimited access to the case file, the incompleteness of the case file is understandable. Laxity in custody served the best interest of all defendants, including the government.

ARGUMENTS

Argument 1 — Inconsistency of Decisions

This Court has expressed its concern about departures by lower courts from accepted and usual course of judicial proceedings. Such departures, including the one here, calls for an exercise of the Court's power of supervision, Rule 19, subdivision 1(b). Likewise, the Court is interested in the quality of justice. The appellate court decision here is patently defective, apparent when it is contrasted with the earlier decision in a companion case, *U.S. v. Peterson, supra.* The instant case opinion of the lower court is incomplete, because of the absence of essential supporting facts, and is unsound as to the conclusion of fact adopted.

Petitioner seeks a remand to the court of appeals to correct this inconsistency. The mandate order should include instructions for the lower court to reverse its decision in the instant case, or else make a reconciliation of the inconsistencies between its two decisions, made by the two different panels of judges. The two cases do involve the same facts (here we have

multiple prosecution for the same act) and the conclusion of the earlier decision was that Dr. Peterson was *not* involved in the fraudulent scheme as a participant, or even as a conspirator. In its opinion here the appellate court adopted an inconsistent conclusion without reconciliation with its contrary conclusion previously adopted. A comparison of the two opinions is revealing. The evaluation of facts made in the first opinion, which facts were subsequently ignored, makes the error in the instant case conclusion a patent one.

In oral arguments before the appellate court Petitioner asked for estoppel, based on the earlier opinion of the appellate court adjudicating the Petitioner's noninvolvement in the filing of claims. Previously the same court had considered and approved the doctrine of estoppel, a case involving a third litigation, *Garden Suburbs Golf & Country Club, Inc. v. Murrell* (CA5, 1950) 180 F.2d 435. There the Fifth Circuit Court held the defendant should have pled estoppel in the second case, which defense at that time would have been a valid one. But where he failed to do so in the second case, the defendant is bound by that second adverse final judgment. In the instant case there is only one judgment that is final, the first one of *U.S. v. Peterson, supra*. It was error for the court of appeals to ignore here in the second case the Petitioner's defense based on estoppel, a defense presented at the oral hearing.

There is a second inconsistency, one of law, in the appellate court's opinion. That court adopted a rule of law in *U.S. v. Prioli* (CA 5, 1959), that under the False Claims Act intent may not be imputed to an unknowing participant. The facts here show Dr. Peterson to be an unknowing participant, his

only act involved checks which were issued as a separate act, entirely separate and occurring weeks after the wrongful act (filing of false claims). Clearly, Dr. Peterson was not involved in the wrongful act, except by implication based on subsequent independent acts.

There should be, there must be, a continuity and consistency in the law. *Helvering v. Hallock* (1940) 309 U.S. 106, 119. Particularly important is continuity under penal statutes such as the False Claims Act, for citizens have the right to know whether their acts do or do not cause huge penalties. Here the huge amount is $132,000, and the government did attempt to collect more than $480,000.

A discussion of the rules of consistency in the law are beyond the scope of this motion. Herein it is noted that the two rules have been violated. As to the rule of *res judicata* see Courts Sec. 188, 21 CJS p. 301, 21 CJS pp. 304-305 and CJS Judgments, Sec. 592, 50 CJS pp. 11-468. As to the elementary rule of law, *stare decisis,* see Courts Sec. 187, 21 CJS pp. 302-304.

Argument 2 —

Petitioner also seeks upon remand for instructions of the Court, ordering the trial judge's verdict to be set aside, on grounds Petitioner was denied a fair trial in violation of his guarantee under Constitutional Amendment V.

As shown by previously stated facts, the government here set out simply "to get Dr. Peterson" and in connection therewith did deprive him of his right to a fair trial. Further, on the part of the trial judge there was improper influence, arising from bias or prejudice, adverse to Petitioner. Such improper influ-

ence, believes Petitioner's counsel, arises from two sources. First, there is gratitude, a repayment of a moral obligation arising from political services rendered the judge. Second, there exists a trial judge hostility, arising from actions of Petitioner's counsel, a petition for disqualification as a trial judge and a petition for mandamus filed after the trial of this case but before his verdict and decision was issued.[5]

Where a defendant is denied a fair trial, due to information withheld by a government trial attorney, the verdict must be set aside. *U.S. v. Rispo* (CA3, 1972) 460 F.2d 965. There is a denial of a fair trial, and this violates the guarantee of due process of law under Amendment V of the Constitution. *Rochin v. California* 342 U.S. 165, 96 L.Ed. 183, 72 S.Ct. 205.

Petitioner and his counsel believe the government case file contained evidence (documents and conclusions) proving Dr. Peterson's noninvolvement with filing false claims, and precluding an adverse verdict.

The defense is entitled to examine government files, and a denial of this inspection deprives defendant of a fair trial. *Jencks v. U.S.*, 353 U.S. 657, 1 L.Ed.2d 1103, 77 S.Ct. 1007.

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[5] These two efforts to transfer the litigation from the trial judge were proper, being responsive to the judge's expressed prejudging and his biased and unfair rulings adverse to petitioner. Under all the Texas cases on tort law the petitioner had a valid cause of action, but the trial judge advised petitioner's counsel on two occasions before trial that he simply had no intention of hearing this case in his court. The trial judge did not want to decide the tort liability issue, nor did he want to be reversed on appeal of his decision adverse to petitioner.

CONCLUSION

For the foregoing reasons, considering each of the two issues separately and both combined, it is respectfully urged that this Petition for Rehearing be granted, and that upon further consideration, a writ of mandamus issue to the United States Court of Appeals for the Fifth Circuit.

Petitioner moves the Court to remand this case to the Fifth Circuit Court of Appeals, with instructions (1) for the appellate court in banc to reconcile its decision in the instant case with its earlier decision and (2) for the verdict of the trial judge to be set aside as Petitioner was denied a fair trial, and his conclusions are not supported by proper findings of fact.

Glynn A. Pugh,
Counsel for Petitioner

CERTIFICATE OF COUNSEL

I, Glynn A. Pugh, counsel for the above-named Petitioner, do hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58, subdivision 2, of the Rules of this Court, and as hereinbefore stated.

Glynn A. Pugh,
Counsel for Petitioner